STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

COUNTY OF WAYNE

Plaintiff-Appellee,

Supreme Court Nos. 124070-124078

- vs -

Court of Appeals No. 238438, 239563, 240187, 240189, 240190, 240193-240195

EDWARD HATHCOCK, et al.,

Defendant-Appellants

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BRIEF OF NON-PARTY INSTITUTE FOR JUSTICE AND MACKINAC CENTER FOR PUBLIC POLICY AS *AMICUS CURIAE*

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ISSUES PRESENTED

1. Does the Michigan Constitution, which restricts the power of eminent domain to takings for "public use," permit condemnation of property for the private use of a corporation on the sole ground that such private use may increase economic development?

2. Should *Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616 (1981) be overruled because it allows the condemnation of property for the benefit of private interests?

3. Does condemnation of private property without advance specification of its future use and a binding commitment to devote the property to that purpose make it impossible to enforce the constitutional guarantee that property may only be condemned for a public use?

Pursuant to Michigan Court Rule 7.306(D), the Institute for Justice and the Mackinac Center for Public Policy hereby file the enclosed brief as *amici curiae* in support of appellants. The Brief conforms to Michigan Court Rules 7.309(A-B) and 7.212(B) and addresses the question of whether the public use test established by *Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616 (1981) is inconsistent with MICH. CONST. art. 10, § 2 and should be overruled.

INTEREST OF *AMICI CURIAE*

The Institute for Justice is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *See United States v. James Daniel Good*, 510 U.S. 43, 61 (1993). It litigates property rights cases throughout the country and files *amicus curiae* briefs in important cases nationwide, including every major U.S. Supreme Court property rights case of the past ten years. The Institute regularly represents property owners fighting condemnation of their homes or businesses for the benefit of private parties.

The Mackinac Center for Public Policy is a non-profit research and educational institute devoted to improving the quality of life for all Michigan citizens by promoting sound solutions to state and local policy questions. The Center is committed to advancing the principles of a free market economy, limited government, and respect for private property. The Center assists policy makers, scholars, business people, the media, and the public by providing objective analysis of

Michigan issues in order to equip Michigan citizens and decision makers to better evaluate policy options.

SUMMARY OF ARGUMENT

The time has come for this Court to overrule *Poletown Neighborhood Council v. City of Detroit,* 410 Mich. 616 (1981) and reaffirm the constitutional protection of Michigan citizens against condemnations that serve the interests of private parties. *Poletown's* endorsement of condemnations whose sole public "benefit" is the possible "bolster[ing] of the economy" is contrary to the Public Use Clause of the 1963 Michigan Constitution and has led to extensive infringements on the rights of property owners. *See id.* at 631. The present case provides a valuable opportunity for this Court to reverse the errors of *Poletown* and their pernicious consequences.

Under the Michigan Constitution, private property can only be condemned for a "public use." MICH. CONST., art. 10, § 2. The transfer of property to a private interest cannot be considered a public use unless "after it is taken, it will be devoted to the use of the public, *independent of the will of the corporation taking it.*" *Berrien Springs Water Power Co. v. Berrien Circuit Judge,* 133 Mich. 48, 53 (1903) (emphasis added). The *Poletown* decision violated this important principle by confusing the "public use" requirement applicable to takings with the much looser "public purpose" requirement regulating expenditure of public funds raised by taxation. *See Poletown,* 410 Mich. at 630 (claiming that "public use" and "public purpose" are "used interchangeably"). This holding ignores both the text of the 1963 Constitution and the major differences between eminent domain and taxation. The constitutional rights of property owners are far more seriously threatened by the former than the latter. There is therefore strong justification for imposing tougher limitations on the exercise of the condemnation power than on

the expenditure of tax revenues. *See, e.g., id.* at 662-79 (Ryan, J., dissenting) (explaining the historical and conceptual differences between "public use" and "public purpose" in great detail).

Poletown's expansion of the concept of public use to justify condemnation of property for transfer to the exclusive control of private parties runs contrary to the text and original intent of the 1963 Constitution. The "ordinary meaning" of the term "public use" clearly indicates a right of public access to condemned property, not merely a nebulous indirect benefit from the use of that property by its new private owners. *See MGM Grand Detroit, L.L.C. v. Comty. Coalition for Empowerment, Inc.*, 465 Mich. 303, 309 (2001) (holding that "the text of the constitution" must be interpreted "according to its ordinary meaning"). This interpretation of the Public Use Clause is also supported by the original intent of those who framed and ratified the 1963 Constitution.

The *Poletown* Court committed another grievous error by endorsing condemnations whose sole "public" benefit is the possibility of "bolstering the economy." *Id.* at 630. This holding severely endangers the rights of almost all property owners because virtually any taking that benefits a for-profit business can be justified on such grounds. *See Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9 (Ill.), *cert. denied,* 537 U.S. 880 (2002) (hereinafter "*SWIDA*") (explaining that a "contribu[tion] to economic growth in the region" cannot be a legitimate ground for condemnation because "incidentally, every lawful business does this").

Residential property is placed at particularly grave risk if economic development is allowed to justify condemnation because homes, almost by definition, are likely to be less economically productive than the for-profit business enterprises that supplant them after a taking. The same point applies to nonprofit uses of property, such as churches. In the *Poletown* case itself, some 1400 homes and numerous churches, schools, and other noncommercial institutions

were destroyed in order to make way for a General Motors ("GM") factory that was considered more economically productive than they were. *See* Section II..A.1, *infra.*

Unfortunately, *Poletown's* "heightened scrutiny" test for takings that "benefit . . . specific and identifiable private interests" fails to alleviate the danger to private property rights created by allowing condemnations for the sole purpose of economic development. *Poletown,* 410 Mich. at 634-35. Indeed, the test actually makes the situation worse by creating a bias in favor of massive commercial building projects that expropriate large amounts of property. Such projects almost inevitably pass the test because they can always claim to create "clear and significant" economic benefits of the sort necessary to pass scrutiny under *Poletown. Id.* at 635. Indeed, even fallacious claims of economic benefit can be used to circumvent the test because *Poletown* does not require any binding commitment compelling the new private owners of condemned property to actually produce the benefits that allegedly justified condemnation in the first place. *See City of Detroit v. Vavro,* 177 Mich. App. 682, 686 (1989) (finding that "a careful reading of the *Poletown* decision reveals that . . .a binding commitment [to provide the economic benefits used to justify condemnation] is unnecessary").

This Court should also reverse *Poletown's* endorsement of takings that transfer property to private interests without a legally binding commitment compelling the new owners to actually use the property for the purposes that justified the condemnation in the first place. Otherwise, private interests and local governments can use bait and switch tactics, securing judicial endorsement of a condemnation on the basis of an alleged public use and then actually using the property for wholly different purposes. The goal of ensuring that "[p]rivate property . . . not be taken for a private purpose" cannot possibly be achieved if courts do not compel the new owners

of condemned property to actually devote it to a public use as opposed to merely claiming that they intend to do so. *Tolksdorf v. Griffith,* 464 Mich. 1, 8 (2001).

Finally, this Court should not feel bound to perpetuate *Poletown's* errors out of adherence to the principle of *stare decisis.* The reliance interests that normally counsel in favor of sticking to precedent actually support reversal in the present case. Property owners threatened with condemnation any time a powerful private interest can plausibly claim that it will devote their land to a more economically efficient use have strong reliance interests in keeping their homes and businesses and reversing *Poletown.*

The *Poletown* court sacrificed constitutional rights in the name of economic development and expediency. The results have been to the detriment of the citizens of Michigan. *Amici* respectfully ask this Court to return to the constitutional protection against condemnations for private use.

ARGUMENT

I. THE PUBLIC USE REQUIREMENT FORBIDS TAKINGS THAT TRANSFER PROPERTY TO A PRIVATE PARTY EXCEPT WHEN THE PUBLIC IS ENTITLED TO USE THE PROPERTY AS A MATTER OF RIGHT.

The Michigan Constitution of 1963 states that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a matter prescribed by law." MICH. CONST., art. 10, § 2. Michigan courts have long held that this provision is meant to ensure that "[p]rivate property may not be taken for a private purpose." *Tolksdorf,* 464 Mich. at 8. Unfortunately, the *Poletown* decision severely undermined this principle by allowing the condemnation of property for the purpose of placing it under the exclusive control of a private party.

A. The *Poletown* Court allowed condemnation for the benefit of private parties because it erroneously conflated "public use" with "public purpose."

1. Pre-*Poletown* precedent forbade the taking of property for transfer to a private party unless the public were allowed to use the property as a matter of right.

Prior to *Poletown,* Michigan courts had consistently held that the public use requirement allowed condemnations only if the condemned property were then to be used by a government entity or by a private entity that is required to permit the public to use the property as a matter of right. *See Poletown,* 410 Mich. at 662-79 (Ryan, J., dissenting) (providing detailed discussion of pre-*Poletown* precedent on this issue). As Justice Fitzgerald explained in his *Poletown* dissent, "the result of our decisions has been to limit the eminent domain power to situations in which direct governmental use is to be made of the land or in which the private recipient will use it to serve the public." *Id.* at 463 (Fitzgerald, J., dissenting).[1] "Land cannot be taken, under the exercise of the power of eminent domain, unless after it is taken, it will be devoted to the use of the public, *independent of the will of the corporation taking it.*" *Berrien Springs Water Power Co. v. Berrien Circuit Judge,* 133 Mich. 48, 53 (1903) (emphasis added); *see also Bd. of Health v. Van Hoesen,* 87 Mich. 533, 539 (1891) (holding that "[t]o justify the condemnation of lands

[1] The only noteworthy potential exceptions to this rule were cases involving transfer of condemned land to private parties for the purpose of removing slums. However, such cases are fundamentally different from other transfers of condemned property to private interests because the key issue in such a taking is the public purpose of "slum clearance" rather than the long-term use to be made of the property by its new owner. *In re Slum Clearance,* 331 Mich. 714, 720 (1951). Condemnations of slums for eventual transfer to private parties were only upheld if "the public purpose of slum clearance is . . . *the one controlling purpose* of the condemnation." *Id.* (emphasis added). Indeed, this Court carefully distinguished a case where the sale of condemned land to a private party was "incidental and ancillary" to the previously achieved goal of "slum clearance" from one where transfer to a private owner was the "primary purpose" of a condemnation. *Id. See also Ellis v. City of Grand Rapids,* 257 F.Supp. 564, 570 (W.D. Mich. 1966) (holding that "it is obvious that the private uses which will finally be involved after a redevelopment project has been implemented are of an incidental or ancillary character, and that of paramount importance is the established public purpose of beautification and redevelopment. Once this primary purpose has been established, it is generally irrelevant what incidental or secondary purposes are involved."); *cf. Poletown,* 410 Mich. at 640-41 (Fitzgerald, J., dissenting) (showing that slum condemnations were an extremely limited exception to the general rule against transfer of condemned property to the exclusive control of private parties). In any event, there is no claim of slum conditions justifying condemnation in the present case, so the Court need not address the rules governing such condemnations

for a private corporation[,] . . . [t]he general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it").

The principle of mandatory public access was so stringently enforced that this Court disallowed condemnations even in cases where the public lacked a right of access to only a part of the condemned property. In *Shizas v. City of Detroit,* 333 Mich. 44 (1952), the Court invalidated a taking where some seventy-five percent of the property in question was to be used as a publicly owned parking facility, but the remaining space was to be rented to private businesses for their exclusive use. *Id.* at 51-52, 59. The Court concluded that "[a] statute authorizing a taking of private property for uses partly public and partly private is void, where the private use is so combined with the public use that the two cannot be separated." *Id.* at 59 (citation omitted).

2. The *Poletown* majority mistakenly relied on precedents delineating "public purpose" in the context of taxation.

The *Poletown* majority circumvented well-established public use precedent in the eminent domain context by relying on cases defining "public purpose" in the context of tax law. The majority mistakenly concluded that the terms "public use" and "public purpose" have "been used interchangeably." *Poletown,* 410 Mich. at 630. In fact, however, the looser "public purpose" standard had consistently been used only in the context of interpreting the state constitution's restriction of the use of tax revenue to "public purposes." *See* MICH. CONST. art. 7, § 21 (establishing the "power to levy . . . taxes for public purposes"). The pre-*Poletown* precedents utilizing the public purpose test relate to taxation or other similar issues. *See Advisory Opinion on the Constitutionality of 1976 PA 295, 1976 PA 297,* 401 Mich. 686, 696 (1977) (discussing concept of "public purpose" in Michigan law and citing precedents). In fact,

the principal precedent relied on by the *Poletown* majority to define the concept of public purpose was a decision upholding the use of tax revenue for the construction of a marina on the Detroit River. *See Poletown,* 410 Mich. at 632 (quoting *Gregory Marina, Inc. v. City of Detroit,* 378 Mich. 364, 396 (1966) for the proposition that "the determination of what constitutes a public purpose is primarily a legislative function, . . . and the determination of the legislative body . . . should not be reversed except in instances where such determination is palpably and manifestly arbitrary and incorrect").

The actual holding of the *Gregory Marina* precedent erroneously cited by *Poletown* was merely that "[n]either the construction nor the operation of a marina by the city of Detroit will violate the constitutional prohibition against expenditures of money or other property for other than public purposes." *Gregory Marina,* 378 Mich. at 400. The case did not in any way hold that the same standards applied to eminent domain cases.

3. The distinction between eminent domain cases and tax cases is necessary to ensure protection of constitutional property rights.

The distinction between tax cases and eminent domain cases, with more stringent judicial review imposed on the latter, is essential to the protection of constitutional property rights. It is improper to conflate these two wholly separate government powers. As Justice Thomas Cooley, perhaps Michigan's most famous jurist, pointed out:

> Reasoning by analogy from one of the sovereign powers to another, is exceedingly liable to deceive and mislead. An object may be public in one sense and for one purpose, when in a general sense and for other purposes it would be idle and misleading to apply the same term . . . The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is public for the demands of one is not necessarily of a character to permit the exercise of another. *People ex rel. Detroit & Howell R.R. v. Salem Township Bd.,* 20 Mich. 452, 477-78 (1870) (Cooley, J.).

Unlike the condemnation of private property through the power of eminent domain, the expenditure of tax revenue does not greatly infringe individual rights. As the Supreme Court of South Carolina recently held, "[t]he 'public purpose' discussed in [tax] cases is not the same as a 'public use,' a term that is narrowly defined in the context of condemnation proceedings . . . We take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property." *Ga. Dep't of Transp. v. Jasper County,* 586 S.E.2d 853, 856 (S.C. 2003).

While taxation involves merely the state appropriation of fungible monetary assets, the power of eminent domain is regularly used to take away property that has a unique and often irreplaceable value to individuals, such as a home that a person has lived in all his life. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings,* 88 COLUM. L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community). Justice Ryan explained the point well in his dissenting opinion in *Poletown*:

> The character of governmental interference with the individual in the case of taxation is wholly different from the case of eminent domain. The degree of compelled deprivation of property is manifestly less intrusive in the former case; it is one thing to disagree with the purposes for which one's tax money is spent; it is quite another to be compelled to give up one's land and be required, as in this case, to leave what may well be a lifelong home and community. *Poletown,* 410 Mich. at 666 (Ryan, J., dissenting).

The *Poletown* case is itself a notorious example of a taking that destroyed nonfungible and irreplaceable individual and community values. It wiped out one of Detroit's few well-run racially integrated communities, one in which numerous Polish-American and African-American residents had lived their whole lives. *See generally* JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989) (hereinafter "WYLIE, POLETOWN"); *see also* David R.E. Aladjem, *Public Use*

and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit *and* Hawaii Housing Authority v. Midkiff, 15 ECOLOGY L.Q. 671, 673-74 (1988) (noting that the Poletown neighborhood "was a rare commodity in an urban environment: a stable, [racially] integrated area that in many ways harkened back to the close-knit ethnic communities that characterized Detroit's past").

A further critical distinction between taxes and takings is that the tax burden falls on all citizens, while condemnation usually targets a single individual or small minority. Public accountability for the abuse of eminent domain is thus much weaker than for misuse of public funds.

For these and related reasons, five state supreme courts have recently reaffirmed the distinction between public use in the eminent domain context and public purpose in the tax context, finding public use to be a stricter standard.[2] While some state courts still claim that

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[2] *See Ga. Dep't of Transp.*, 586 S.E.2d at 856 (holding that " 'public purpose' . . . in [tax] cases is not the same as a 'public use' . . .in the context of condemnation proceedings"); *Town of Beloit v. County of Rock*, 657 N.W.2d 344, 356-57 (Wis. 2003) (holding that standard of public purpose for expenditure of public bonds is lower than public use standard applied in eminent domain cases); *SWIDA*, 768 N.E.2d at 8-9 (distinguishing legal standard for public use in condemnations from the lower legal standard of public purpose in public expenditures; *see also Friends of the Parks v. Chicago Park District*, 786 N.E.2d 161, 167-68 (Ill. 2003)) (same); *Piedmont Triad Airport Auth. v. Urbine,* 554 S.E.2d 331, 339 (N.C. 2001) (holding that "[t]here remains a distinction between the terms 'public purpose and 'public use' . . . [T]he term 'public purpose' pertains to governmental expenditures of tax monies, while the term 'public use' pertains to the exercise of eminent domain"); *Mfg. Housing Comm. v. State,* 13 P.3d 183, 189-91, 195 (Wash. 2000) (en banc) (holding that "public use" and "public purpose" are "not synonymous" and that the power of "eminent domain" is "restric[ted]" by "literally defining 'public use'"). Unlike the other four cases cited here, *Piedmont* does not directly address the question of whether the public use standard in a condemnation case requires more rigorous judicial scrutiny of government action than the public purpose standard in tax cases. The reason for this anomaly is the fact that the defendant in *Piedmont* challenged the taking of his property under the North Carolina Constitution's clause regulating expenditure of tax money rather than under a clause specifically addressing the power of eminent domain. *See Piedmont*, 554 S.E.2d at 338 (noting that the "Defendant focuses his . . . arguments upon the public purpose clause of Article V, Section 2(1) of the Constitution of North Carolina, which provides 'that the power of taxation shall be exercised in a just and equitable manner, for public purposes only'") (quoting N.C. CONST. art. V, § 2(1)). Nonetheless, the *Piedmont* court still reaffirms the key distinction between public purpose and public use. *Id.* at 339.

public purpose and public use are identical,[3] the national trend is in the opposite direction. This Court should follow the well-reasoned trend established by the supreme courts of Illinois, North Carolina, South Carolina, Washington, and Wisconsin.[4]

B. *Poletown's* expansive definition of public use goes against the text and original intent of the 1963 Constitution.

Poletown's expansion of public use to include condemnations that transfer property to the exclusive control of private interests runs counter to the text and original intent of the Article X, § 2 of the 1963 Constitution. "In interpreting a constitution, the primary objective is to discern the original intent of the constitutional text." *J & J Constr. Co. v. Bricklayers & Allied Craftsmen, Local 1,* 468 Mich. 722, 736 (2003) (Young, J., concurring); *see also People v. Bulger,* 462 Mich. 495, 507 (2000) ("In construing our constitution, this Court's object is to give effect to the intent of the people adopting it."). The *Poletown* decision runs afoul of this principle.

1. The ordinary meaning of "public use" implies a legal right of the public to use condemned property.

As a general rule, "the text of the constitution" must be interpreted "according to its ordinary meaning." *MGM Grand Detroit,* 465 Mich. at 309. In the case of the Takings Clause of the 1963 Constitution, the text unequivocally requires that takings be for a "public use," not a mere "public benefit." MICH. CONST., art. 10, § 2. The "ordinary meaning" of the word "use" indicates the ability to control property, not just receive some indirect benefit from the control of that property by others. *MGM Grand Detroit,* 465 Mich. at 309. The most relevant standard dictionary definition of "use" indicates that the word means "the legal enjoyment of property that

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[3] *See, e.g., City of Kansas City v. Hon,* 972 S.W.2d 407, 410 n.3 (Mo. Ct. App. 1998) (noting that "[a]lthough the Missouri Constitution uses the term 'public use," relevant statutes, ordinances, and case law use the terms 'public use' and 'public purpose' interchangeably").

[4] See cases cited above.

consists in its employment, occupation, exercise, or practice." WEBSTER'S NEW COLLEGIATE DICTIONARY 1279 (1980). Similarly, *Black's Law Dictionary* defines "public use" as "[t]he public's beneficial right to use property or facilities subject to condemnation." BLACK'S LAW DICTIONARY (7th ed. 1999). For both laypersons and lawyers, the ordinary meaning of "public use" requires an actual right of public access to condemned property, not mere indirect enjoyment of benefits from its exploitation by a new private owner.

2. A public right of access to condemned property transferred to private owners is required by the original intent of the 1963 Constitution.

The ordinary meaning of "public use" is consistent with the original intent of the framers of the 1963 Constitution. "[T]he primary source for ascertaining [the Constitution's] meaning is to examine its plain meaning as understood by its ratifiers at the time of adoption." *Reinhart Co. v. Winiemko,* 444 Mich. 579, 606 (1994). In addition to the constitutional text itself, this Court has recognized the special significance of the 1962 Constitutional Convention's "Address to the People." "The reliability of the 'Address to the People' (now appearing textually as 'Convention Comments') lies in the fact that it was approved by the general convention on August 1, 1962 as an explanation of the proposed constitution. The 'Address' was also widely disseminated prior to the adoption of the constitution by vote of the people." *Regents of the Univ. of Mich. v. State,* 395 Mich. 52, 60 (1975) (footnote omitted).

In the case of Article X, § 2, the Address to the People indicates that the new provision is "a revision of Sec. 1, Article XIII, of the present [1908] constitution, which, in the judgment of the convention, is sufficient safeguard against the taking of private property for public use." MICH. CONST., art. 10, § 2 (Convention Comment). The framers thus sought to maintain the public use standards prevalent under the previous 1908 Constitution, which they saw as a "sufficient safeguard" for the rights of property owners. *Id.*

As was surely well-known to members of the convention, legal standards under the 1908 and previous constitutions required that property could only be condemned for transfer to private interests if the public had a binding legal right to use the property after transfer to its new owner. A study of eminent domain law under the 1908 Constitution commissioned by the 1961 Constitutional Convention Preparatory Commission specifically found that "[t]he state may not use its power of eminent domain to take the property of one citizen and give it to another or to devote the property to a private use." Solomon Bienefeld, *The Michigan Constitution and Eminent Domain* at 2, (Mich. Const. Convention Studies, Prepared for Constitutional Convention Preparatory Commission, Sept. 1961). *See also* §§ I.A.1-2 *infra* (citing cases). Thus, the 1963 framers and ratifiers did not intend to permit condemnations that transfer property to the exclusive control of private interests. To the contrary, they sought to retain the then well-established rule that "[l]and cannot be taken, under the exercise of the power of eminent domain, unless after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." *Berrien Springs Water Power Co. v. Berrien Circuit Judge,* 133 Mich. 48, 53 (1903).

II. THE POSSIBILITY OF INCREASED ECONOMIC DEVELOPMENT IS NOT A PUBLIC USE JUSTIFYING CONDEMNATION OF PRIVATE PROPERTY.

A. Allowing condemnations for economic development seriously endangers constitutional property rights.

1. The economic development rationale can justify almost any taking that benefits a commercial enterprise.

The *Poletown* Court committed a grave error in holding that the possibility of economic benefit to the community is a public use sufficient to justify condemnation of private property. *See Poletown,* 410 Mich. at 631 (holding that condemnation may be resorted to "in order to bolster the economy"). As Justice Ryan pointed out at the time, this ruling "seriously

jeopardized the security of all private property ownership." *Id.* at 645 (Ryan, J., dissenting). Justice Fitzgerald's dissent likewise warned that "[t]he decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently 'public' to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses." *Id.* at 644 (Fitzgerald, J., dissenting).

The disrespect for property rights engendered by *Poletown* was dramatically illustrated by the Supreme Court of Nevada's reliance on the case to justify a recent decision upholding the condemnation of property for the purpose of building a parking lot to service casinos in downtown Las Vegas. *City of Las Vegas Downtown Redev. Agency v. Pappas,* 76 P.3d 1, 12 & n.44 (Nev. 2003).[5] If *Poletown* licenses the condemnation of land for the benefit of casino owners, it can justify virtually any taking that serves the interests of any private business.

The Supreme Court of Illinois has recently explained the grave danger to constitutional property rights inherent in allowing a mere "contribu[tion] to economic growth in the region" to justify takings. *SWIDA,* 768 N.E.2d at 9. Such a standard could justify virtually any taking that benefited a private business because "incidentally, every lawful business does this." *Id.* The Illinois court echoed Justice Fitzgerald's warning that the economic benefit criterion provides virtually a blank check for takings because "[a]ny business enterprise produces benefits to society at large." *Poletown,* 410 Mich. at 644 (Fitzgerald, J., dissenting). "Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of

[5] Technically, *Pappas* was not an "economic development" case because the claimed public use was the alleviation of "blight." *Id.* at 12-15. However, the Nevada court defined "blight" alleviation so broadly as to make it practically coextensive with economic development. *See id.* at 13 (holding that "[e]conomic blight involves downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes"). Indeed, the allegedly blighted area in *Pappas* was the "downtown area . . . of the City of Las Vegas," renowned as one of the leading entertainment centers in the world. *Id.*

property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." *Id.* at 644-45.

Likewise, the Supreme Court of Kentucky has pointed out that:

> If public use were construed to mean that the public would be benefitted in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion. *Prestonia Area Neighborhood Ass'n v. Abramson*, 797 S.W.2d 708, 711 (Ky. 1990) (quoting *Chesapeake Stone Co. v. Moreland,* 104 S.W. 762, 765 (Ky. 1907)).

Similarly, the California Supreme Court in *Sweetwater Valley Civic Ass'n v. City of National City*, 555 P.2d 1099, 1103 (Cal. 1976) held that eminent domain "never can be used just because the [city] considers that it can make better use or planning of an area than its present use or plan." The California court concluded that "it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses" to justify condemnation of property. *Id.*

Numerous cases from other states support the conclusion that condemnation cannot be justified where the only public benefit is the possibility of increased economic growth.[6] This Court should follow their lead, as well as that of Michigan's own pre-*Poletown* jurisprudence.

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[6] *See, e.g., Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1175 (E.D. Mo. 2003) (owner likely to prevail on claim that condemnation of shopping center for transfer to Target so that Target would keep its economic benefits in the city lacked public use); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp.2d 1123, 1129-31 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003) (finding that condemnation to replace one store with another, more lucrative one, was not a public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *Ga. Dep't of Transp.*, 586 S.E.2d at 856 (holding that even a "substantial . . . projected economic benefit" cannot justify a "condemnation"); *Merrill v. City of Manchester*, 499 A.2d 216, 217-18

2. Allowing condemnations for economic development poses special dangers to residential and nonprofit property owners.

Takings for economic development pose an especially grave threat to the property rights of homeowners. Almost by definition, residential uses of property are unlikely to be as economically productive as commercial uses. In the modern era, few homeowners engage in extensive productive activity in their homes, and thus it can always be argued that the condemnation of homes for the purpose of replacing them with factories will "bolster the economy." *Poletown,* 410 Mich. at 631.

This exact dynamic was at work in the *Poletown* case itself. Over 4200 people lost their homes because of the perception that a new GM factory would make more economically productive use of their property.[7] The *Poletown* majority did not even consider the possibility that this vast destruction of residential property might undercut the "clear and significant" public "benefit" allegedly created by the condemnation. *Id.* at 634.

The property of nonprofit organizations is also placed at special risk by allowing condemnations for the sake of fostering economic growth. The justification of economic growth is a common reason given for the condemnation of church property. For example, the city of

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(N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) ("We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other shopkeepers"); *City of Little Rock v. Raines*, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); *Hogue v. Port of Seattle*, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential properties so that agency could "devote it to what it considers a higher and better economic use," *id.* at 187); *Opinion of the Justices*, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); *see also Daniels v. Area Plan Comm'n*, 306 F.3d 445, 464-65 (7th Cir. 2002) (replacing residential uses with economically more efficient commercial ones did not bear substantial relation to a public purpose because the condemnation "only benefits the public if [the private party] benefits first, and even then if the commercial development is completed and successful...).

Cypress, California, sought to condemn land owned by a church center in order to transfer the land to Costco because Costco would pay property taxes and the church did not. *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1228-29 (C.D. Cal. 2002). *Poletown* itself resulted in the elimination of numerous nonprofit institutions: sixteen churches, a 278 bed hospital, and several schools were destroyed. ARMAND COHEN, POLETOWN, DETROIT: A CASE STUDY IN 'PUBLIC USE' AND REINDUSTRIALIZATION 4 (Lincoln Land Institute, 1982). The *Poletown* majority failed to even mention the loss of these institutions and the nonfinancial public benefits they provided. As in the case of homes, it is always possible to argue that the forcible replacement of a church or other nonprofit organization with a for-profit business will "bolster the economy." *Poletown,* 410 Mich. at 631.

B. The *Poletown* requirement of "heightened scrutiny" does not adequately protect constitutional rights.

In an attempt to mitigate the danger to private property created by its decision to consider mere economic development to be a public use, the *Poletown* court held that "[w]here, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Poletown,* 410 Mich. at 634-35. Unfortunately, this "heightened scrutiny" test fails to provide adequate protection for property rights, and in some respects actually makes the situation worse.

The heightened scrutiny test fails to protect private property for three major reasons: It can be overcome simply by increasing the scale of the taking, it lacks any determinate standards, and it can even be defeated by claims of public benefit that turn out to be inaccurate. In addition,

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[7] For estimates of the number of homes destroyed, see, e.g., Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City,* DOLLARS & SENSE, July 2001 (estimating that 4200 people lost their homes); *see also* WYLIE, POLETOWN at 52 (noting that the condemned area contained about 1400 households).

empirical evidence shows that heightened scrutiny has failed to prevent numerous condemnations of property for transfer to private interests.

1. The heightened scrutiny standard creates perverse incentives to increase the amount of private property condemned.

The purpose of the heightened scrutiny test is to ensure that there is a "clear and significant" public benefit resulting from a condemnation. *Poletown,* 410 Mich. at 635. Unfortunately, this creates a perverse incentive to increase the amount of property condemned rather than reduce it. Since the public "benefit" involved is the "bolstering of the economy," the larger the commercial project served by a condemnation and the more property owners expropriated as a result, the greater the chance that courts will find that the resulting economic growth is "clear and significant" enough to pass the test. *Id.* at 631, 635.

Michigan cases applying the heightened scrutiny test unfortunately display precisely this kind of bias in favor of grandiose projects benefiting large corporate enterprises, projects that violate the rights of large numbers of property-owners. At the same time, courts applying the heightened scrutiny test have sometimes invalidated condemnations of small amounts of property intended to benefit individuals and small to medium-size businesses. *See, e.g., Tolksdorf,* 464 Mich. at 9-11 (invalidating legislation that allows condemnation of limited amounts of property in order to build roads for the benefit of landlocked property owners); *City of Lansing v. Edward Rose Realty, Inc.,* 442 Mich. 626, 638-42 (1993) (invalidating taking of two apartment complexes for the benefit of a cable television company); *City of Novi v. Robert Adell Children's Funded Trust,* 253 Mich. App. 330, 342-56 (2003) (invalidating condemnation for the purpose of building a small spur line for the benefit of a private corporation); *City of Center Line v. Chmelko,* 164 Mich. App. 251, 253, 257-64 (1987) (invalidating condemnation of "two parcels of property" in order to facilitate expansion of a "local car dealership").

On the other hand, courts applying *Poletown* have felt themselves compelled to uphold condemnations of large amounts of property for the benefit of major commercial enterprises. For example, the Court of Appeals reluctantly held that *Poletown* required it to uphold the condemnations of 380 acres of private property in order to "transfer the property to [the] Chrysler Corporation for the construction of a new automobile assembly plant." *Vavro,* 177 Mich. App. at 683. The *Vavro* court concluded that both the Chrysler condemnation and *Poletown* itself constituted "abuse[s] of the power of eminent domain." *Id.* at 685. Nonetheless, the Court of Appeals was forced to follow *Poletown* and endorse the validity of the condemnation of large amounts of property for the benefit of Chrysler. *Id.* at 685-86; *see also Detroit Edison Co. v. City of Detroit,* 208 Mich. App. 26, 29-30 (1995) (reaffirming *Vavro's* conclusion that approval of the Chrysler condemnations is required by *Poletown*).
And, in *Poletown* itself, of course, the construction of a large GM plant was held sufficient to justify the displacement of 4200 people and 600 businesses. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City,* DOLLARS & SENSE, July 2001 (hereinafter Michael, *Detroit*).

Thus, the *Poletown* heightened scrutiny test protects property owners least precisely when they need it most: in cases where substantial numbers of people are displaced for the benefit of large, politically powerful corporations. Indeed, a corporation seeking to ensure that a condemnation benefiting it would be upheld under *Poletown* is well-advised to plan a large construction project and ask for as much property as possible. In *Vavro*, the Court of Appeals recognized that this state of affairs is an invitation to "abuse of the power of eminent domain" and urged this Court to "take the matter up and correct the wrong done in the *Poletown* decision." *Vavro,* 177 Mich. App. at 685. We can only second this hope.

2. The heightened scrutiny test can be circumvented simply by overestimating the economic benefits of a taking.

Even if the other shortcomings of the heightened scrutiny test could be overcome, localities and corporations can circumvent it simply by overestimating the likely economic benefits of a condemnation. Municipalities may overestimate intentionally, or they may simply take a private business' self-serving estimates at face value. As Justice Ryan pointed out in his *Poletown* dissent, the heightened scrutiny test does not require that the private beneficiaries of condemnations be legally compelled to supply the promised economic benefits. *Poletown,* 410 Mich. at 679 (Ryan, J., dissenting); *see also Vavro,* 177 Mich. App. at 686 (holding that "a careful reading of the *Poletown* decision reveals that . . .a binding commitment [to provide the economic benefits used to justify condemnation] is unnecessary in order to allow the city to make use of eminent domain"). Thus, nothing prevents municipalities and private interests from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners. Indeed, the Court of Appeals has concluded that *Poletown* does not even require that the new owner proceed with the project that was initially used to justify a condemnation at all, much less that it is required to provide the public with a set level of economic benefit. *See Vavro,* 177 Mich. App. at 686 (upholding a taking transferring property to the Chrysler Corporation for the construction of a new auto assembly plant despite the fact that "Chrysler . . . has not entered into a binding commitment with the City of Detroit to construct the [plant] following the city's use of the power of eminent domain").

Poletown itself illustrates the danger of taking inflated estimates of economic benefit at face value. In that case, the City of Detroit and GM claimed that the construction of a new plant on the expropriated property would create some 6150 jobs. *Poletown,* 410 Mich. at 650 (Ryan,

J., dissenting). The estimate of "at least 6000 jobs" was endorsed by both Detroit Mayor Coleman Young and Thomas Murphy, Chairman of the Board of General Motors. *Id.* at 651, 654 (citing statement of Mayor Young and reprinting letter from Thomas A. Murphy, Chairman of the Board, General Motors, to Coleman A. Young, (October 8, 1980)).

Yet, as Justice Ryan warned, "there are no guarantees from General Motors about employment levels at the new assembly plant . . . [O]nce [the condemned property] is sold to General Motors, there will be no public control whatsoever over the management, operation, or conduct of the plant to be built there." *Id.* at 679. Justice Ryan pointed out that "General Motors will be accountable not to the public, but to its stockholders," and would therefore make decisions as to the use of the property based solely on stockholder interests rather than the economic interests of the general public that the condemnation was intended to further. *Id.*

Justice Ryan's warning was prescient. The GM plant opened two years late, and, as of 1988—seven years after the *Poletown* condemnations—it employed "no more than 2500 workers." Michael, *Detroit.* Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3600" workers, less than 60% of the promised 6150. *Id.*

Nothing in the *Poletown* heightened scrutiny test can ensure that such drastic miscalculations are avoided in future cases. Both corporate interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation. Courts are in a poor position to second-guess plausible-looking financial and job estimates provided by officials. Even if the governments and corporations involved do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and likelihood of success of projects that advance one's own private interests. Whether corporate and government leaders deliberately lie or honestly believe

that "what is good for General Motors is good for America," the outcome is likely to be the same.

3. The heightened scrutiny test lacks clear standards.

Although the *Poletown* heightened scrutiny test requires that the "the public interest [be] the predominant interest . . . advanced" by a condemnation, and that the "public benefit" of the taking be "clear and significant," it does not provide actual standards for determining how large the benefit must be in order to pass the test or when an interest is "predominant." *Poletown,* 410 Mich. at 635. It also fails to consider the quality of evidence required to prove the existence of the purported benefits or possibility that the public benefits may be outweighed by harms to property owners. Subsequent decisions have not clarified the test or articulated standards. *See, e.g., Tolksdorf,* 464 Mich. at 10 (striking down a condemnation under the heightened scrutiny test, but failing to provide any clarification of its standards).

As a result, courts are left with little guidance as to how to apply the test. Both local governments and property owners find it difficult to predict which way the test will go in any given case. Even worse, the current heightened scrutiny test makes it difficult for courts to evaluate evidence of economic benefit presented by governments and corporations because it provides no standards of proof that the evidence must meet. This is a particularly serious problem in cases where large-scale condemnations benefiting major corporations are at issue. The latter can easily generate massive quantities of sometimes dubious "evidence" supporting their position. The heightened scrutiny test gives courts no guidance as to how such evidence should be weighed.[8]

[8] The shortcomings of the heightened scrutiny test thereby render the decision "unworkable," which is one basis on which this Court will overrule a prior case. *See Robinson v. City of Detroit,* 462 Mich. 439, 464 (2002) (noting that the case for overruling a precedent is strengthened if "the decision at issue defies 'practical workability'").

The adoption of a clear rule banning condemnations justified solely by the expectation of economic benefit would eliminate this uncertainty. Lower courts, municipalities, and property owners would all have a clearer idea of their respective rights and obligations.

4. Condemnations that transfer property to private interests remain common in Michigan, despite the heightened scrutiny test.

The failure of the heightened scrutiny test to curtail the danger to private property created by the *Poletown* decision is evidenced by the prevalence of condemnations that transfer property to private parties in Michigan. From 1998 to 2002 alone, at least 138 condemnation proceedings have been filed in Michigan for the purpose of transferring property to private parties, and 173 more were threatened. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 100 (2003) (available at http://www.ij.org/publications/castle/). Michigan's record in this respect compares poorly with that of other states. In the five-year period from 1998 to 2002, only two other states had more reported condemnation filings for the purpose of transferring property to private interests than Michigan. *Id.* at 2. The city of Detroit—the jurisdiction involved in both *Poletown* and the present case[9]—achieved the dubious distinction of filing more condemnations for private ownership than any other city in the same time period. *Id.* Detroit condemnations included takings for casinos and sports teams, and one where a developer with ties to the Mayor was able to obtain a condemnation that resulted in the destruction of an entire African-American neighborhood. *Id.* at 102-06.

[9] The technical plaintiff in the present case is the County of Wayne rather than the City of Detroit, however the purpose of the taking is to benefit Detroit by promoting development near the Detroit Metropolitan Airport. *Hathcock,* 2003 WL 1950233 at *1-2.

The figures presented here underestimate the prevalence of condemnations for the benefit of private parties, as they were compiled from news reports and court filings. *Id.* at 100. Many cases are unpublished, and many other condemnations go unreported in the press. *Id.* at 2.

Even in situations where the courts might ultimately vindicate a threatened property owner's rights, many owners lack the time, money, and legal know-how necessary to prevail in litigation. This is particularly likely to be true in cases where relatively poor property-owners are opposed by a powerful local government or large corporation that commands extensive resources and has access to top-quality legal representation. Only a clear legal rule will discourage municipalities from attempting such condemnations and thus protect the many condemnees who cannot afford to go to court.

A bright-line test that limits private condemnations to the narrow range of cases where the public will be able to use the property as a matter of right will curtail eminent domain abuses far more effectively than the leaky heightened scrutiny test has. This Court should replace *Poletown's* failed approach with one that provides genuine protection for property owners.

C. Condemnations for the purpose of economic development fail even on their own terms.

The case against allowing condemnation of private property solely for the purpose of promoting economic development is strengthened by the fact that there is little evidence to prove that such takings actually do benefit the economic interests of the community. There is no reason to believe that genuine economic benefits will be the true determinant of condemnation decisions, and much reason to conclude that decisions will be driven by the political influence of private interests that benefit from them. *See, e.g.,* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective,* 3 TEX. REV. L. & POL. 49, 79-83 (1998) (explaining how powerful private interests can use the condemnation process to

their advantage); Daniel Farber, *Public Choice and Just Compensation,* 9 CONST. COMMENTARY 279, 289-91 (1992) (explaining how the political process advantages private beneficiaries of condemnations over victimized property owners).

Politically powerful private interests such as GM are much more likely to succeed in persuading politicians of the merits of their condemnation projects than politically weaker groups whose projects might serve the public interest more. Similarly, the properties of poor and politically weak owners are more likely to be targeted for condemnation than those of wealthy and influential ones. Indeed, the Poletown neighborhood itself may have been targeted in part because its people were "largely lower-income and elderly" and many "assumed that these people would not have the resources or the know-how to fight back." WYLIE, POLETOWN at 58. Condemnation of high-income neighborhoods rarely makes sense; not only do the residents have the money to fight back, but the property in the area is likely to be prohibitively expensive.

The *Poletown* case illustrates how the promised economic benefits of condemnations often fail to materialize. Not only did the new GM plant create far fewer jobs than promised,[10] but the limited economic benefits that the plant did create were likely outweighed by the economic harm it caused to the city.

The "public cost of preparing a site agreeable to . . . General Motors [was] over $200 million." *Poletown,* 410 Mich. at 657 (Ryan, J., dissenting). GM paid the city only $8 million to acquire the property. *Id.* In addition to the cost to the city treasury, we must also consider the economic damage inflicted by the destruction of some 600 businesses and 1400 residential properties. Michael, *Detroit.* Although we have no statistics on the number of people employed by the businesses destroyed as a result of the *Poletown* condemnation, it is quite possible that more people lost jobs as a result of the decision than gained them. If we assume that the 600

eliminated businesses employed a modest average of slightly more than four workers, their total lost work force turns out to be greater than the 2500 jobs created at the GM plant by 1988. *Id.* And this calculation does not consider the jobs and other economic benefits lost as a result of the destruction of numerous nonprofit institutions such as churches, schools, and hospitals. Overall, even if we consider its impact in purely economic terms, it is likely that the *Poletown* condemnation caused more harm to the people of Detroit than good.

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance far beyond that case itself. In *Poletown,* the magnitude of the economic crisis facing Detroit and the detailed public scrutiny given to the city's condemnation decision led the Court to conclude that the economic benefit of the taking was particularly "clear and significant." *Poletown,* 410 Mich. at 634. The Court even went so far as to say that "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project." *Id.* If the claimed "public benefit" of even so "clear" a case as *Poletown* ultimately turned out to be a mirage, it seems unlikely that courts will do any better in weighing claims of economic benefit in more typical cases where the evidence is less extensive and less closely scrutinized.

III. CONDEMNATION OF PRIVATE PROPERTY SHOULD NOT BE PERMITTED WITHOUT A BINDING COMMITMENT TO THE PROPERTY'S INTENDED FUTURE PUBLIC USE.

The condemnations in this case suffer from an additional problem—the lack of assurance of future public use. A taking that transfers property to a private party cannot be upheld without binding advance specification of its future public use.[11]

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[10] See discussion in Section II.B.2, *infra*.

[11] In the present case, there is a dispute between the parties as to whether the plaintiffs had adequately specified the intended future use of the defendants' property. *Hathcock,* 2003 WL 1950233 at *1, 3-4. The *Amici Curiae* take no position on this purely factual question. There appears to be no dispute that the government has procured no binding

As this Court has recognized, the purpose of the Public Use Clause of the Michigan Constitution is to guaranteethat "property may not be taken for a private purpose." *Tolksdorf,* 464 Mich. at 8. This constitutional purpose cannot be fulfilled if reviewing courts do not require condemning authorities to specify what they intend to use the property for. In the simplest terms, if the government doesn't know what it is going to do with the property, it can't know if it's a public use or not.

Moreover, even when there is a statement of intended use, the stated purposes must be legally binding on both the condemnor and the private interest to which ownership of the property will be transferred. If there is no such binding requirement, then nothing prevents government officials and private interests from justifying a taking on the basis of one projected public use and then switching to another, purely private, use after the condemnation has obtained judicial sanction. As this Court explained as far back as 1891, a public use justifying resort to the power of eminent domain must be "fixed and definite" and the new private owner of the property "must be compelled by law" to devote it to that use. *Van Hoesen,* 87 Mich. at 539. Similarly the U.S. Court of Appeals for the Seventh Circuit recently held that "[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if [the new] landowner chooses to use his property in a beneficial, but not mandated, manner." *Daniels,* 306 F.3d at 466.

Courts in many other jurisdictions have explicitly held that property cannot be condemned without advance assurances that it will be employed only for specified public uses.[12]

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commitments by future private owners or users of the site that they will use it in a way consistent with the initial promises of the government in executing these condemnations.

[12] *See, e.g., Cincinnati v. Vester*, 281 U.S. 439, 447-48 (1930) (holding that "private property could not be taken for some independent and undisclosed public use"); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (en banc) (holding that agreement lacked controls over the use of the property and "[s]uch controls are designed to assure that use of the property condemned will be in the public interest."); *State ex. rel. Sharp v. 0.62033 Acres of*

Unfortunately, the *Poletown* case departed from this sensible principle by upholding a taking transferring property to a private corporation despite the lack of a binding agreement requiring that corporation to actually provide the alleged economic benefits used to justify the condemnation in the first place. *Poletown,* 410 Mich. at 679 (Ryan, J., dissenting); *see also Vavro,* 177 Mich. App. at 686 (holding that *Poletown* does not require the new private owner of condemned property to "enter . . . into a binding commitment . . . to construct the project" that was used to justify condemnation). This aspect of *Poletown* gives corporations and local governments an effective blank check to use bait and switch tactics to justify condemnation on the basis of a genuine public use and then utilize the property for a wholly different, purely private, purpose.

Poletown's endorsement of condemnation without binding assurances that the condemned property will actually be employed to further the public use that justified the taking should be overruled whether or not this Court chooses to maintain the other elements of the *Poletown* decision. Indeed, if the Court is willing to permit condemnations for the purpose of creating economic benefits, it is especially important that it at least ensure that the claimed benefits are actually provided by the property's new private owners.

Land, 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd* 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time") (emphasis in the original); *Alsip Park Dist. v. D & M P'shp*, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "[I]f the facts" in a condemnation proceeding "established that . . . [the condemnor] had no ascertainable public need or plan, current or future for the land, defendants [property owner] should prevail"); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient."); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a "public agency acquires . . . property for the purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

IV. THE DOCTRINE OF *STARE DECISIS* CANNOT JUSTIFY RETAINING THE *POLETOWN* DECISION.

The principle of *stare decisis* should not stand in the way of overruling the deeply flawed *Poletown* decision. This Court has held that "*stare decisis* is a principle of policy rather than an inexorable command, and . . . the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." *Robinson v. City of Detroit,* 462 Mich. 439, 464 (2002) (quotations and notes omitted). A "wrongly decided precedent" should be retained only if the ruling has created "reliance interests" and "overruling would work an undue hardship because of that reliance." *Id.* at 465-66. Moreover, this Court can also follow the United States Supreme Court's recognition that the "policy" of *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton,* 521 U.S. 203, 235 (1997).

A. There is a broad consensus that *Poletown* was wrongly decided.

"The first question" addressed in deciding whether to overrule a precedent "should be whether the earlier decision was wrongly decided." *Robinson,* 462 Mich. at 464. In the present case, there is an unusually broad consensus supporting the view that *Poletown* was egregiously wrong.

In addition to the arguments against it advanced by the defendants in this case and by *amici curiae, Poletown* has been repeatedly criticized by Michigan judges, several of whom have urged this Court to overrule it. *See Adell,* 253 Mich. App. at 343 (indicating agreement with Justice Ryan's dissent in *Poletown*); *City of Detroit v. Lucas,* 180 Mich. App. 47 (1989) (Beasley, P.J., dissenting) (expressing hope that "the Supreme Court will, in due course, accept the challenge to reexamine the basis of the *Poletown* decision"); *Vavro,* 177 Mich. App. at 685 (urging this Court to "take the matter up again and correct the wrong done in *Poletown*"). In the

present litigation, a powerful concurring opinion joined by two of the three Court of Appeals judges who decided the case urges this Court to overrule both *Poletown* and their own decision relying on that precedent. *County of Wayne v. Hathcock,* 2003 WL 1950233 at * 7-9 (Mich. Ct. App. Apr. 24, 2003) (Murray, J., concurring).

Poletown has also been severely criticized by prominent scholars on both the right and the left. As Professor James Ely, a leading property law expert recently noted, "[t]oo many observers of differing political viewpoints, the *Poletown* case was a poster child for excessive condemnation." James W. Ely, Jr., *Can the "Despotic Power" be Tamed? Reconsidering the Public Use Limitation on Eminent Domain,* PROBATE & PROP. Nov.-Dec. 2003 at 31, 35.[13]

B. Reliance interests support overruling *Poletown* rather than upholding it.

Given that *Poletown* was wrongly decided, the Court "must consider whether overruling [this] prior erroneous decision would work an undue hardship because of reliance interests or expectations and, conversely, whether the prior decision defies 'practical workability.'" *Sington v. Chrysler Corp.*, 467 Mich. 144, 162 (2002). In the case of *Poletown,* reliance interests not only do not prevent overruling of an erroneous precedent but actually counsel in favor of it.

As long as *Poletown* remains binding precedent, the reliance interests of property owners are continually at risk of being sacrificed for the benefit of any private party who can convince a local government that expropriating property for its benefit might "bolster the economy."

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[13] For criticism of *Poletown* by liberal scholars, see, e.g., Radin, *supra,* at 91 (arguing that the *Poletown* failed to respect individual and community rights); John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown v. G.M. and the City of Detroit,* 41 WASH. & LEE L. REV. 49 (1984) (generally criticizing the decision and resulting condemnation); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction,* 130 U. PA. L. REV. 1349, 1354 (1982) (noting that "the arguments deployed by Detroit in support of the publicness of this venture could be deployed in support of virtually any venture imaginable"). For criticism by libertarian and conservative scholars, see, e.g., Richard A. Epstein, *Property, Speech and the Politics of Distrust,* 59 U. CHI. L. REV. 41, 62 n.60 (criticizing *Poletown* as a "notorious" decision that "sustained a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed"); Kochan, *supra,* at 69-73, 86-89 (arguing that *Poletown* was a case of exploitation of the eminent domain process for the

Poletown, 410 Mich. at 631. Individuals generally rely on the notion that they will be able to continue to live in their homes and run their businesses until they retire. Eminent domain disrupts these expectations, forcing out long-term residents and newcomers alike, shutting down businesses, and destroying community institutions. As discussed throughout this brief, *Poletown's* "heightened scrutiny" test does little to mitigate this risk because it can so easily be circumvented and because its application is so uneven and uncertain. *See* Section II.B, *infra.* The shortcomings of the heightened scrutiny test also render the decision "unworkable," further strengthening the case for overruling it. *See Robinson,* 462 Mich. at 464 (noting that the case for overruling a precedent is strengthened if "the decision at issue defies 'practical workability'").

The government will probably claim an interest in maintaining the status quo. However, governments have a multitude of other tools to promote economic development, including public financing, loans, tax incentives and abatements, purchase of property from willing sellers, transfer of government-owned property, zoning, and land and building regulation, to name a few. Its reliance interest in using the "tool" of private use eminent domain in a discrete number of projects cannot outweigh the interests of all property owners in Michigan. Nor should any government interest convince this Court to retain the *Poletown* decision under the doctrine of *stare decisis.*

CONCLUSION

No doubt the government and its *amici* will argue that without the power of eminent domain, the sky will fall. The ability to engage in development projects will be hopelessly hamstrung, they will claim. Amici offers two responses to these claims. First, they are untrue. Before the use of eminent domain for private development projects, land was still bought and

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benefit of a powerful private interest); Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV. 61, 111-12 (1986) (concluding that *Poletown* was probably an example of illegitimate rent-seeking by private interests).

buildings were still built. That even happens today with projects whose sponsors lack the desire or political muscle to convince the government to use the power of eminent domain for their benefit. Second, as shown in this brief, condemnations for economic development generally fail to produce any real economic benefits to the community. Finally, and most importantly, convenience does not make a policy constitutional. Just because eminent domain may be a more efficient means of property acquisition than purchase from a willing seller, that does not make it constitutional to take property from one private individual to transfer it to another.

There are many laudable goals that could be more efficiently achieved without the constraints of law. Criminal prosecutions, for instance, would no doubt be much easier without constitutional constraints. Certain foreign policy goals might be more easily achieved if newspapers could be prohibited in advance from publishing on certain topics. But Michigan's Constitution does not sacrifice individual rights in the name of expediency. This Court should not read it to do so.

Respectfully submitted this 8th day of January 2004, by

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